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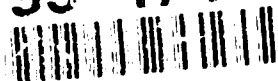
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United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-240377

December 26, 1990

The Honorable Nick J. Rahall, II
Chairman, Subcommittee on Mining
and Natural Resources
Committee on Interior and
Insular Affairs
House of Representatives

Dear Mr. Chairman:

This report responds to your request that we determine whether the federal government and the holder of mining claims in the Oregon Dunes National Recreation Area followed the legal and administrative requirements for patenting claims filed under the Mining Law of 1872. The report also discusses inconsistencies between the mining law's patent provision and more recent national natural resource policies.

As agreed, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of the letter. At that time, we will send copies to interested parties and make copies available to others on request.

Please contact me at (202) 275-7756 if you or your staff have any questions about this report. Major contributors to the report are listed in appendix IV.

Sincerely yours,

James Duffus III
Director, Natural Resources
Management Issues

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Executive Summary

Purpose

The Mining Law of 1872 allows U.S. citizens and businesses to locate mining claims on most federal lands and then to obtain full title to these lands through a process called patenting. In 1959, mining claims were filed for silica sand along the Oregon coast. In 1961, the Department of the Interior's Bureau of Land Management removed about 18,000 acres of national forest lands, including the mining claims, from further mineral entry. In 1972, the Congress established the Oregon Dunes National Recreation Area which included those withdrawn lands. On October 10, 1989, at the request of the claim holder, the federal government transferred title through the patent process to 780 acres of mining claims in this scenic and valuable area.

Concerned over the transfer of land within the recreation area to private ownership, the Chairman, Subcommittee on Mining and Natural Resources, House Committee on Interior and Insular Affairs, asked GAO to (1) examine the federal government's determination that the sand on the claims is an "uncommon variety," which brings the claims under the Mining Law of 1872 and therefore allows patenting and (2) determine whether federal agencies and the claim holder followed the legal and administrative requirements for patenting and whether the government was required by the Coastal Zone Management Act to notify the state of Oregon that it intended to patent the claims.

Background

The Mining Law of 1872 was enacted to promote exploration and development of domestic mineral resources. Over the decades legislation has reduced the number of minerals covered by the mining law and provided protections to keep federal lands in public ownership. For example, the Multiple Use Mining Act of 1955 removed common varieties of sand, stone, gravel, pumice, pumicite, clay, and cinders from the mining law's patent provision and required instead that the land containing such materials remain in public ownership. The act also gave federal agencies the authority to sell the mineral materials on the lands. However, the 1955 act allows deposits of these materials, if they have unique properties that give them special and distinct value, to remain under the mining law, giving claim holders the right to seek a patent to both the land and the materials. In addition, while not reducing claim holder's rights under the Mining Law of 1872, the Federal Land Policy and Management Act of 1976 established a broad national policy that calls for the federal government to maintain ownership of public lands and obtain fair market value for its resources.

The process to patent 780 acres of land in the Oregon Dunes National Recreation Area began in 1959 when two sets of claims were located along the Oregon coast—one called the Dreamer claims, on 3,160 acres, and a second called the Fox claims, on 1,480 acres. The claims contained sand high in silica content making it suitable for glass-making. In 1961, the Bureau of Land Management withdrew 18,000 acres on the Oregon Coast from mineral entry so that new mining claims could not be filed, and in 1972 the Congress passed the Oregon Dunes National Recreation Area Act, which set aside a 40-mile strip, including the land covered by the Dreamer and Fox claims, for recreation purposes.

In 1968, the government invalidated the Dreamer claims, but in 1979 it ruled that the Fox claims were valid because the sand was uncommon and constituted a valuable mineral deposit before the lands were withdrawn. In 1982, the claim holder filed an application to patent the Fox claims, which were then within the recreation area. In July 1989, as the government was about to patent the claims, the state of Oregon requested that the government comply with a provision of the Coastal Zone Management Act that requires federal agencies, under certain circumstances, to notify the states before undertaking activities that might affect the coastal area.

On October 10, 1989, the government patented 780 of the 1,480 acres covered by the Fox claims. The remaining 700 acres were not patented because they were not on land open to patenting or they did not have sufficient mineral value to meet patenting requirements.

Results in Brief

The federal government acted properly when it concluded that the claims contained an uncommon variety of sand and, therefore, the claims were subject to the patent provision of the Mining Law of 1872. Also, the claim holder and the federal government complied with the legal and administrative requirements for patenting. The Fox claims were properly located, recorded, and maintained, and the patent application was properly filed. In addition, GAO believes the government's position that it was not required under the Coastal Zone Management Act to notify the state of the proposed patenting is legally supportable. Patenting these claims does raise questions about the consistency of the mining law's patent provision with more recent national natural resource policies that call for the federal government to maintain ownership of public lands and obtain fair market value for public resources.

Principal Findings

Sand on Fox Claims Is Subject to Mining Law of 1872

In 1977, the government reviewed the Fox claims to determine if they could be invalidated. Determining whether the sand in the claims was subject to the mining law and thus patentable was a key factor in the determination. An earlier court decision had held that deposits of common variety minerals, as identified in the Multiple Use Mining Act of 1955, can be determined to be uncommon if they have unique properties that give them distinct and special value. The federal minerals examiner who evaluated the claims concluded that the sand in the claims had such unique properties, and thus the sand was subject to the mining law. Although GAO did not examine the original geologic data in detail, it reviewed the minerals examiner's report and concluded that the proper steps were taken and the report's conclusions seemed appropriate.

Legal and Administrative Requirements Were Met

The mining law contains various requirements governing locating, recording, maintaining, and patenting mining claims. GAO found documentation that the claim holder and the federal government met these requirements. GAO specifically focused on whether the claim holder established that a valuable mineral deposit—a key requirement for patenting—had been discovered. The question of whether a valuable mineral deposit has been discovered can arise (1) when the government challenges the validity of a claim, (2) when a claim holder files a patent application, and (3) when land is withdrawn from mineral entry. For the Fox claims, discovery was established at all three points. GAO also believes that the federal government's position that it was not required under the Coastal Zone Management Act to notify the state of the proposed patenting is legally supportable. The transfer of property title, of itself, does not change the way the land is being used.

Patenting Is Inconsistent With More Recent National Natural Resource Policies

Although the claim holder and the federal government met the requirements for patenting, transferring these lands to private ownership illustrates why GAO concluded in a March 1989 report¹ that the mining law's patent provision runs counter to more recent national natural resource policies relating to federal stewardship. Patenting is not essential for minerals exploration and development because other provisions of the

¹Federal Land Management: The Mining Law of 1872 Needs Revision (GAO/RCED-89-72, Mar. 10, 1989).

mining law give claim holders the right to use the land for mining-related activities.

From the perspective of resource management, because the land has been patented and transferred to private ownership, the federal government has lost control over its management. To maintain the control needed to manage the recreation area and conserve the scenic and other values that contribute to the public enjoyment, the Forest Service is attempting to reacquire the lands through a land exchange. From a fiscal perspective, the federal government received a patent fee of \$1,950, or less than 1 percent of the \$350,000 estimated value of the land. Moreover, if the sand—valued at millions of dollars—is extracted, the federal government will not receive financial compensation for the resources that it has given up.

Recommendations

GAO makes no recommendations in this report.

Agency Comments

The Department of Agriculture's Forest Service and the Department of the Interior provided written comments on a draft of this report. Both agreed with the facts in the report and GAO's conclusions that the legal and administrative requirements for patenting were followed. Interior, however, said that GAO implied there are conflicts and inconsistencies between the Mining Law of 1872 and the Federal Land Policy and Management Act. Interior pointed out that the Federal Land Policy and Management Act sets a policy of federal ownership of public lands and obtaining fair market value for its resources, but in doing so excludes the Mining Law of 1872 and specifically the patent provision. GAO recognizes that the mining law is exempt from the Federal Land Policy and Management Act and has inserted language in this report to emphasize this point. However, GAO notes that patenting is not essential for minerals exploration and development because other provisions of the mining law give claim holders the right to use the land for mining-related activities.

Interior's and Forest Service's comments and GAO's evaluation are presented in appendixes II and III.

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Abbreviations

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| BLM | Bureau of Land Management |
| GAO | General Accounting Office |
| IBLA | Interior Board of Land Appeals |
| FLPMA | Federal Land Policy and Management Act |
| CZMA | Coastal Zone Management Act |

Introduction

On October 10, 1989, the Department of the Interior's Bureau of Land Management (BLM) transferred ownership of 780 acres of federal land in the Oregon Dunes National Recreation Area to private ownership under authority of the Mining Law of 1872. The Chairman of the Subcommittee on Mining and Natural Resources, House Committee on Interior and Insular Affairs, asked us to determine whether, in making this transfer, the claim holder and the federal government followed legal and administrative requirements.

Background

The Mining Law of 1872, as amended, (30 U.S.C. 22 *et seq.*) was enacted to promote the exploration and development of domestic mineral resources. It allows citizens and businesses to prospect for and mine certain valuable mineral deposits on federal lands not closed or withdrawn from mining. The law contains several provisions that make it attractive to prospectors and claim holders. First, citizens do not have to have the government's permission to locate mining claims or to prospect for minerals so long as they do not cause any significant disturbance to the surface of federal lands. Second, claim holders can preserve the rights to their claims by certifying annually that at least \$100 worth of drilling, excavation, or other development-related work has been done for each claim. Third, valuable minerals can be extracted without paying the federal government any fees or royalty.¹ And fourth, claim holders have the option of obtaining fee simple title² to both the land and the minerals by patenting the claims for either \$2.50 or \$5.00 an acre—an amount that approximated the fair market value for western grazing and farm land in 1872.

Patenting a claim requires proof that a valuable mineral deposit has been found (called discovery), and that at least \$500 has been spent to develop the claim. The Department of Agriculture's Forest Service and Interior's BLM can question the validity of mining claims on their respective lands. However, BLM is responsible for maintaining the records associated with mining claims on all public lands, conducting the administrative processes for determining the validity of these claims, and issuing patents.

Over the decades legislation has reduced the number of minerals covered by the mining law. For example, section 3 of the Act of July 23,

¹ A royalty is an amount paid by a lessee for minerals produced, usually calculated as a percentage of value.

² Fee simple title means acquiring the ownership rights and interests associated with a property.

1955, ch. 375 (30 U.S.C. 601, 611), commonly called the Multiple Use Mining Act of 1955, removed common varieties of sand, stone, gravel, pumice, pumicite, clay, and cinders from the mining law's coverage, so that the land containing such materials could not pass to private ownership. The act also authorized federal agencies to sell the mineral materials on these lands. However, the 1955 act allows mineral deposits having unique properties that give them special and distinct value to remain under the mining law, thereby giving claim holders all associated rights under that law, including the right to seek a patent.

A number of other pieces of land-use legislation, including the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1701, et seq.) and the Coastal Zone Management Act (CZMA) (16 U.S.C. 1451 et seq.) can be relevant to mining. FLPMA establishes policies that call for the federal government to maintain ownership of federal lands and obtain fair market value for its resources. However, FLPMA also preserves claim holders' rights under the Mining Law of 1872, including the right to patent public lands.

Among CZMA's intended purposes is that of fostering consistency between federal and state agencies regarding activities along the coast. The act requires that federal agencies, to the maximum extent practicable, conduct in a manner that is consistent with approved state management programs, those activities that are covered by the law and that directly affect the coastal zone. When agencies determine that a proposed activity is covered by the act and will directly affect the coastal zone, they are required to provide the affected state with a "consistency determination" at least 90 days before they grant final approval for such an activity. If a federal agency proposes an activity covered by the law and decides that it does not directly affect the state's coastal zone, it is still required to notify the state's coastal zone management agency of its decision at least 90 days prior to the proposed action.

History of the Oregon Dunes National Recreation Area

Sand dunes line the Pacific Ocean beaches along the middle of Oregon's coast. In 1959 Mr. Maurice Duval³ located two sets of claims in the Siuslaw National Forest along the Oregon Coast—one called the Dreamer claims on 3,160 acres and a second called the Fox claims, on 1,480 acres. Because the sand in both sets of claims is very high in silica

³Several other people, mostly Duval family members, were associated with the claims through partnerships known as grub-stake contracts. We will refer to these claim holders collectively as the Duvals.

content, Mr. Duval believed that it was suitable for making some types of glass as well as for use in the foundry industry.⁴

Because of increasing recreation on the dunes, BLM withdrew about 18,000 acres in the Siuslaw National Forest from mineral entry in 1961—thus prohibiting exploration and the filing of new claims. Claim holders prior to the date of withdrawal, however, maintain valid existing rights to their claims. In March 1972 Public Law 92-260 established the Oregon Dunes National Recreation Area, setting aside a 40-mile strip between the Siuslaw River and Coos Bay for recreation purposes. The area became a part of the Forest Service's system of national recreation areas. The map in figure 1.1 shows the location of the two sets of mining claims in the Oregon Dunes National Recreation Area.

The extensive sand dunes just inland from the beaches are the recreation area's most important feature and, according to the Forest Service, helped attract over 2 million visitors in 1989. The Forest Service manages the recreation area to provide for public recreation and to conserve scenic values, while maintaining the integrity of the environment. It manages the dunes area in which the patented Fox claims are located as a roadless, isolated area. The area is noted for its quiet and scenic beauty and is also used by much wildlife, including migrating waterfowl. Figure 1.2 provides a view of the recreation area.

Objectives, Scope, and Methodology

The Chairman of the Subcommittee on Mining and Natural Resources, House Committee on Interior and Insular Affairs, expressed concern about the issuance of a patent for mining claims for sand within the Oregon Dunes National Recreation Area. Specifically, he asked that we (1) examine the government's determination that the sand on the claims is an "uncommon variety" and therefore covered under the patenting provision of the Mining Law of 1872 and (2) determine whether the federal agencies involved and the claim holder followed the legal and administrative requirements for patenting. As part of our review of the legal and administrative requirements, the Chairman's office asked us to address two specific procedural questions: (1) whether the patent application contained proof of a valuable mineral deposit at the critical dates during the process and (2) whether BLM was required by the CZMA to notify the state of Oregon that it was issuing the subject patent. He also

⁴Sand which can be used to make glass has specific properties that distinguish it from sand that can only be used for construction purposes. These properties are (1) very high silica content, (2) only a trace of unwanted minerals and no organic materials, (3) even sand grain size, and (4) no clay in the sand.

Figure 1.1: Duval Claims in the Oregon Dunes National Recreation Area

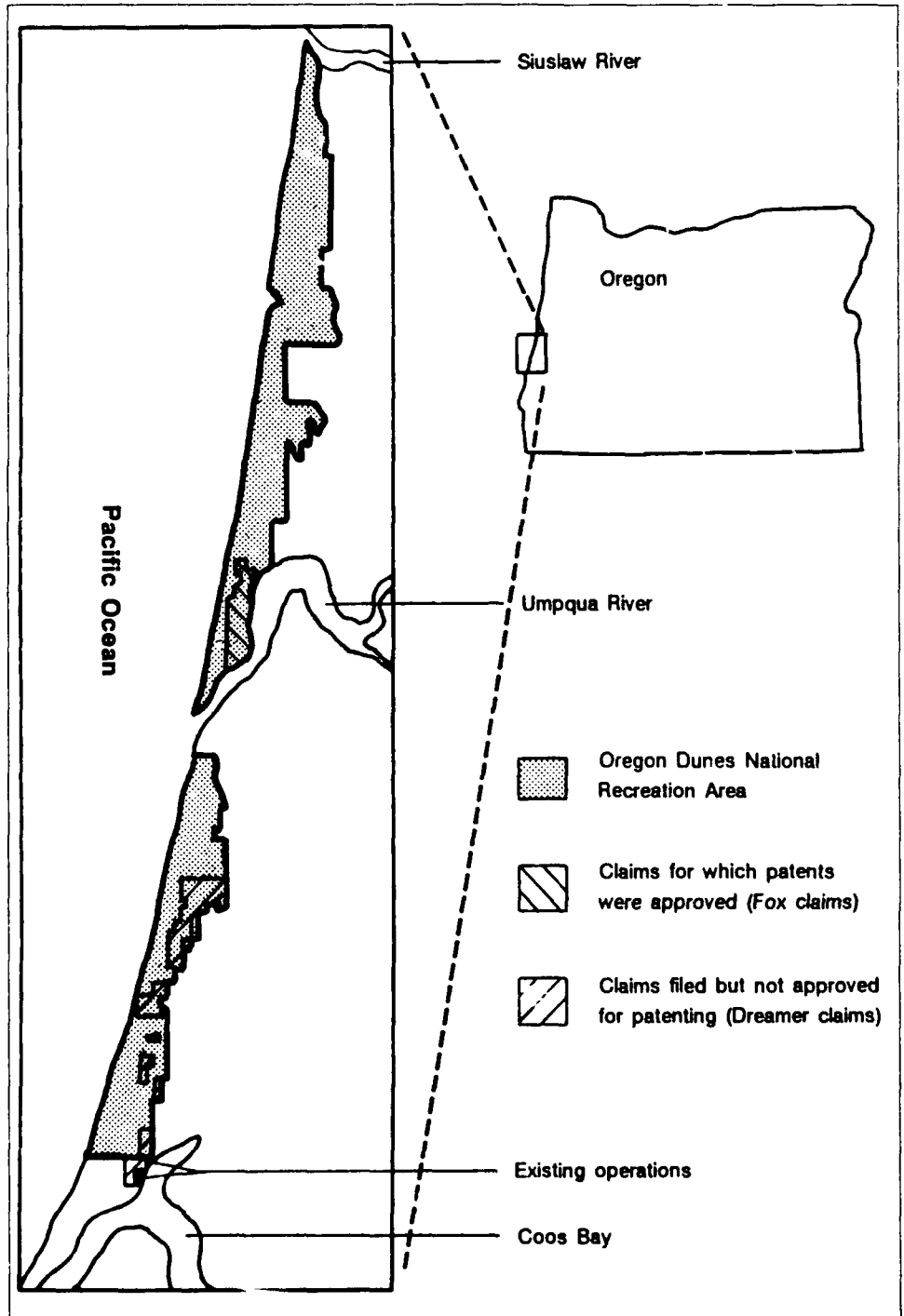


Figure 1.2: View of the Oregon Dunes
National Recreation Area



Source: U.S. Forest Service, Siuslaw National Forest

asked that we provide a chronological case study from staking of the claims through patent issuance. (See app. I for the chronology.)

To evaluate the government's determination that the sand on the claims was an "uncommon variety" and therefore covered under the Mining Law of 1872, we reviewed the transcripts and related documents associated with the various reviews within Interior's administrative review process for the Fox and Dreamer claims and with associated appeals for the Dreamer claims. We reviewed the legal documents prepared as part of both proceedings in which the validity of the claims was challenged and interviewed the attorney who represented the Forest Service in both proceedings. We also reviewed the key administrative and court decisions that comprise the case law on common variety minerals.

To determine whether the required legal and administrative steps leading to patenting were followed, we identified the required steps from appropriate laws and regulations and reviewed agency documents to assess compliance with each. Specifically, we took the following measures:

- 1) To determine that the mining claims had been properly located and recorded, we reviewed the copies of the Notice of Location of Mining Claims that had been filed with the Douglas County, Oregon recorder's

office to verify that the notices had been filed in a timely manner both with the county recorder's office and, subsequent to FLPMA, with BLM.⁵

2) To determine whether the claims had been maintained, we reviewed the affidavits filed with BLM certifying that the annual work requirement had been met.

3) To determine whether the patent application had been properly filed, we reviewed the patent application documents that had been filed with BLM to ensure that the information supplied met the requirements of the federal regulations.

To determine whether proof of a valuable mineral deposit had been established at the critical dates during the process, we reviewed the information included in the transcripts of the Fox claims hearings in 1978 and the testimony of the witnesses for the claim holder. We also reviewed the information filed with the patent application, including affidavits from interested buyers and financial statements from the claim holder's existing mining operation, as well as projected financial statements from the proposed mining operation.

To determine whether BLM was required to comply with the notification provisions of the CZMA, we reviewed the correspondence between BLM and the State of Oregon's Department of Land Conservation and Development and spoke to officials of both agencies. We also reviewed the CZMA, the Interior Solicitor's opinion on the applicability of the act, and the court case upon which it was based.

To develop the chronological case study, we reviewed all relevant files available at BLM's Oregon State Office and the Forest Service's Region 6 Office, which provided an extensive history of the 30-year process. We also spoke to BLM and Forest Service officials who had been involved in the processing of the claims and the patent application.

Our work was conducted between October 1989 and March 1990 in accordance with generally accepted government auditing standards.

⁵Before implementation of FLPMA, the filing requirements for notices of location and annual assessment work performed were controlled by state laws. There was no requirement before 1976 to file documentation on most mining claims with BLM unless the claim holder was applying for patent. FLPMA required holders of claims located before October 21, 1976—the date of FLPMA's enactment—to record their claims before October 22, 1979, or else they would be considered abandoned and void.

Chapter 1
Introduction

Interior and the Forest Service provided written comments on a draft of this report. Interior's comments are presented and evaluated in appendix II, and Forest Service's comments are presented and evaluated in appendix III.

Patenting Process Meets Legal and Administrative Requirements

To patent claims for sand, claim holders must first prove that the sand is an uncommon variety. This entails establishing that the sand in question has unique qualities that give it distinct and special value. Once over that hurdle, claim holders then must meet the mining law's various requirements, including establishing that they have (1) discovered a valuable mineral deposit, (2) met the annual work requirement, and (3) met the patenting requirements. In addition, the State of Oregon asserted that, before issuing the patent, BLM had to meet the notification requirements of the Coastal Zone Management Act (CZMA).

We believe the Duvals, BLM, and the Forest Service met the relevant requirements. However, we also believe that patenting these claims, which in the absence of state and local zoning requirements would allow mining in a national recreation area, illustrates the inconsistencies between the patenting provision of the mining law and federal stewardship requirements in more recent national natural resource policies.

Sand in the Patented Mining Claims Was Determined to Be an Uncommon Variety

After BLM withdrew the Oregon Dunes National Recreation Area from mineral entry in 1961, the federal government challenged the validity of the Dreamer and Fox claims in an effort to invalidate them. The federal government contended that the Dreamer claims contained common variety sand and that, for both the Dreamer and Fox claims, discovery of a valuable mineral deposit had not been made before the lands were withdrawn. After several appeals were exhausted, the Dreamer claims were declared null and void on the basis that a valuable mineral deposit had not been discovered. The government ruled that a valuable mineral deposit had been discovered on the Fox claims and, except for certain lands that were not subject to claim or did not contain enough valuable minerals, they were eventually patented.

Dreamer Claims Were Challenged and Declared Null and Void

When BLM closed part of the dunes to further exploration for minerals, the boundary enclosed the Fox and the Dreamer claims. However, the Duvals maintained rights under the mining law to develop these claims.

The Forest Service began its efforts to invalidate the two sets of mining claims by challenging the Dreamer claims in 1966. The mineral report prepared by a Forest Service minerals examiner concluded that the sand on the claims was so widespread that it was a common variety and therefore not covered by the mining law. The report also concluded that even if the claims had been covered by the mining law, they would be invalid because the claim holders had not proven that a market existed

for the sand prior to withdrawal—a key factor in meeting the requirement for discovery of a valuable mineral deposit. The initial BLM hearing examiner's decision agreed with that of the government, and the Dreamer claims were ruled invalid in 1968.

The claim holder appealed this decision, but BLM's Office of Hearings and Appeals upheld it. A further appeal to the Interior Board of Land Appeals was also decided in favor of the government. The Board's decision, however, did not rule on the question of whether the sand was uncommon. Rather it ruled that because the claim holder had not proven that a market existed at the time the lands were withdrawn from mineral entry, the claims did not meet the valuable mineral deposit test, and therefore the Dreamer claims were null and void.

Fox Claims Were Challenged but Subsequently Patented

In 1977, the Forest Service reviewed the Fox claims to determine whether they too could be invalidated. However, before the Forest Service challenged the Fox claims, a court decision reviewed, approved, and further clarified the requirements which the Secretary of the Interior had established for determining whether a material listed in the Multiple Use Mining Act is common or uncommon.¹ The court held that deposits of materials listed in the act as common variety minerals can be determined to be uncommon if their unique properties give them special and distinct value, and that value leads to a higher price or lower production costs.

Given this legal precedent and the Forest Service minerals examiner's conclusion² that the sand had unique properties that made it suitable for

¹In *McClarty v. Secretary of the Interior*, 408 F.2d 907, 908 (9th Cir. 1969) the following guidance was used for determining whether andesite (a building stone) on Forest Service land was common or uncommon.

1. There must be a comparison of the mineral deposit in question with other deposits of such minerals generally.
2. The mineral deposit must have a unique property.
3. The unique property must give the deposit a distinct and special value.
4. If the special value is for such uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use.
5. The distinct and special value must be reflected by the higher price which the material commands in the marketplace or by lower production cost.

²Although we did not examine the original geologic data in detail, we reviewed the minerals examiner's report and concluded that the proper steps were taken and the report's conclusions seemed appropriate.

glass-making, a use which commanded a higher price than common sand, the Forest Service agreed with the claim holders that the sand was uncommon and therefore that the land was subject to claim under the mining law. The minerals examiner also concluded, however, that the claim holder had not proven the existence of a market for the sand before the lands were withdrawn and therefore had not proven discovery of a valuable mineral deposit. In response to this conclusion, BLM challenged the validity of the claims. However, Interior's Office of Hearings and Appeals ruled in 1979 that the claims were valid, in part, because additional information provided by the Duvals established that in 1961, when the lands were withdrawn from mineral entry, there had been a potential market for the sand. A government appeal to Interior's Board of Land Appeals was decided for the Duvals in 1981, and the Fox claims were upheld as valid.

In 1982, the Duvals filed an application to patent the Fox claims. During the patent application process, BLM disapproved patenting 480 acres of the claims because they were filed on lands that had never been open to exploration for minerals and an additional 220 acres because they did not contain sufficient minerals to be considered a valuable mineral deposit. The remaining 780 acres were recommended for patenting in 1987, and the patent was issued on October 10, 1989. The government received \$1,950, based on a patent fee of \$2.50 an acre, for this land.

The Legal and Administrative Requirements of the Mining Law of 1872 Were Met

The Duvals, BLM, and the Forest Service complied with the legal and administrative requirements of the Mining Law of 1872 for filing, maintaining, and patenting the Fox claims. Implementing regulations require a claim holder to satisfy the following legal and administrative requirements during the mining claim and patent application process:

- **Locating.** To locate a mining claim, the claimant must (1) stake the claim (except for certain placer claims—claims for minerals found in masses of sand or similar material), (2) post a notice of location on the claim, and (3) comply with state laws, including filing a notice of location with the county recorder's office.
- **Recording.** To record a mining claim, the claimant must file a copy of the official notice of location at the appropriate BLM office within 90 days after the date of location of the claim, or by October 22, 1979, for claims that were located before October 21, 1976.
- **Maintaining.** To maintain a mining claim, each year the claim holder must file an affidavit attesting that at least \$100 worth of development-related work has been carried out for each claim. The claim holder must

file the affidavit with BLM as well as with the county recorder's office. Under certain conditions, such as those in which legal impediments prevent the work from being done, the claim holder may request a deferment of the annual work requirement, but must file a notice of intention to hold the mining claim.

- **Patenting.** To patent a mining claim, the claim holder must prove that at least \$500 of development work has been performed for each claim and that each claim to be patented contains a valuable mineral deposit, i.e., one that can be extracted and marketed at a profit, and provide the documentation required by federal regulations.

We found that BLM had documentation to support compliance with the legal and administrative requirements noted above. The evidence we reviewed also shows that when the validity of information submitted by the claim holder was challenged, BLM requested and received additional information verifying that the requirements had been met.

Proof of a Valuable Mineral Deposit Was Established

Under the provisions of the Mining Law of 1872, the question of whether a valuable mineral deposit has been discovered can arise when the validity of a claim is challenged by the government or when a patent application is filed by a claim holder. In addition, if a mining claim is located within an area that is subsequently withdrawn from mineral entry, the claim holder must also prove that a valuable mineral deposit has been discovered as of the date the land was withdrawn.

For the Fox claims, discovery was required and established at all three of the above points. On November 4, 1977, BLM issued a complaint challenging the validity of the Fox claims because a valuable mineral deposit had not been discovered as of 1961 (the year the lands were withdrawn). In its answer to the complaint, the Duvals proved to both Interior's Office of Hearings and Appeals and to Interior's Board of Land Appeals that a valuable mineral deposit had been discovered as of 1961, and as of the date of the challenge. In addition, during the patent review process the Duvals proved that the claims contained a valuable mineral deposit as of that time.

The CZMA and the Patent Process

When the state of Oregon's Department of Land Conservation and Development learned that a mining patent was to be issued for the Fox claims, it requested that BLM provide either the consistency determination or the 90-days notice called for by the CZMA.

BLM maintained that issuing a patent does not constitute a federal activity as envisioned under the law and therefore declined to issue a consistency determination or to give the state a 90-day notice. In taking this position, BLM determined that the act's provisions did not apply to patenting because issuance is not discretionary on BLM's part and because the mere transfer of a title does not constitute a federal activity. As precedent for its actions, BLM cited a court decision (Ono v. Harper, 592 F. Supp 698, 1983) in which the U.S. District Court for Hawaii found that a sale of federal land by the General Services Administration to a private individual did not constitute a federal activity that directly affected the coastal zone.

We believe BLM's position is legally supportable. In this instance, although the act requires all federal activities that directly affect the coastal zone to be coordinated with a state's coastal management agency, like the Ono case, transfer of title alone does not directly affect the coastal zone since, of itself, it does not change the way the land is being used.

Forest Service Seeks to Restore Patented Lands to Federal Ownership

The Forest Service's policy in managing the recreation area is to acquire, through purchase or land exchange, all private lands in the "dunes sector," which includes the area where the patented claims are located. The purpose of these acquisitions is to give the Forest Service the control needed to manage recreation and conserve the scenic and other values that contribute to the public's enjoyment. To this end, it has acquired 1,200 acres since the recreation area was established and, until the Fox claims were patented, no private land remained in the dunes sector.

In an attempt to restore the 780 acres of patented lands to federal ownership, the Forest Service, BLM, and the Duvals agreed to explore exchanging the patented land for land outside the recreation area. Accordingly, the Duvals agreed not to exercise their ownership rights until March 1991 to allow the Forest Service time to evaluate suitable options for an exchange.

Establishing the value of land to be exchanged is difficult. In the case of the Fox patent, when the land covered by the claims passed from public to private ownership, it became subject to state and county restrictions that limit its use and value. For example, the state's legally binding land-use plan prohibits mining in significant shoreland areas and residential development on beaches and active foredunes—grassy sand hills rising

from the beach. The county zoning plan covering the patented lands is even more restrictive in that it would prohibit not only mining but also residential development in this dunes area.

Thus, the options for developing the patented lands are limited. On this basis, Forest Service staff have preliminarily estimated the value of the Duvals' patented land at about \$350,000. The Duvals, on the other hand, believe the exchange value should recognize the mineral value of the sand. If the mineral value is recognized, the exchange value would be much higher than the value for land whose use is restricted. For example, in a 1987 mineral evaluation of the Fox claims conducted for the Forest Service, the author, a consulting mineral geologist, estimated that the Fox claims contained between 13 and 25 million tons of silica sand and that the cost, selling price, and resulting profit that the Duval's were experiencing at their existing operation, which is located near the Fox claims, provided a rough indication of the profit they could obtain from the Fox sand. On the basis of a profit figure of about \$6 per ton, 19 million tons of sand, a 95-year operating life, and a 10-percent discount rate, we estimate that the Fox patent could be worth \$12 million.³

Patenting Is Not Consistent With More Recent National Natural Resource Policies

The transfer of 780 acres of public lands within a national recreation area into private ownership illustrates why in our 1989 report⁴ we concluded that the patent provision of the Mining Law of 1872 runs counter to more recent national natural resource policies relating to federal stewardship. These policies call for the federal government to maintain ownership of public lands and to obtain fair market value for public resources. Moreover, patenting is not essential for minerals exploration and development because other provisions of the mining law give claim holders the right to use the land for mining-related activities.

³In our present value calculation we used 19 million tons of sand (the mid-point of the range in the 1987 mineral evaluation of the Fox claims), a \$6 per ton profit (a conservative figure within the range discussed in the mineral evaluation), a 95-year operating life, and a 10-percent discount rate. The 95-year operating life is an approximation that takes into account the amount of sand available to be mined and the market demand for the sand. At current rates, 10 percent is between the government's borrowing cost and private sector capital costs (and expected returns). We did not conduct sensitivity analyses on the parameters of the valuation. However, larger estimates of the tons of sand and the profit per ton and a lower discount rate would produce a higher valuation. Smaller estimates of the tons of sand and the profit per ton, and a higher discount rate would produce a lower valuation.

⁴Federal Land Management: The Mining Law of 1872 Needs Revision (GAO/RCED-89-72, Mar. 10, 1989).

From the perspective of resource management, because the land is patented, the Forest Service has lost control over its management. If an exchange cannot be made by March 1991, the Duvals are free to use the 780 acres in any way they choose within state and county restrictions. Forest Service officials believe that mining is unlikely because of the county's strict zoning. However, they believe that the presence of private land within the recreation area will limit the agency's ability to effectively manage adjoining public land. For example, they believe it would be more difficult to implement planned programs to enhance wetlands. They also anticipate that activities such as the use of off-road vehicles—which they consider inconsistent with the area's use as a roadless, isolated area noted for its quiet and scenic beauty—will increase with or without the Duvals' approval, and/or that a waterfowl hunting club could be established.

From a fiscal perspective, the federal government received \$1,950, or less than 1 percent of the \$350,000 estimated value of the land with constrained options for development. Moreover, if the sand—valued at millions of dollars—were to be extracted, the federal government would not receive any monetary compensation.

Conclusions

The responsible federal agencies and the claim holder met the legal and administrative requirements for patenting mining claims within the Oregon Dunes National Recreation Area. We believe, however, that the patenting of mining claims within this scenic public recreation area for a fraction of the lands' estimated value, coupled with the accompanying management problems that it creates, illustrates the inconsistencies between the mining law's patent provision and more recent national natural resource policies.

Agency Comments and Our Evaluation

The Department of Agriculture's Forest Service and Interior provided written comments on a draft of this report. Both agreed with the facts in the report and GAO's conclusions that the legal and administrative requirements for patenting were followed. Interior, however, said that GAO implied that there are conflicts and inconsistencies between the Mining Law of 1872 and FLPMA. Interior pointed out that FLPMA sets a policy of federal ownership of public lands and obtaining fair market value for its resources, but in doing so excludes the Mining Law of 1872 and specifically the patent provision. Interior also commented that GAO had not recognized other national policies that call for managing public

lands to meet the demands for domestic sources of minerals and fostering and encouraging private enterprise to develop these resources.

We recognize that FLPMA exempts the Mining Law of 1872 and, specifically, its patent provision from current national natural resource policies relating to federal stewardship of public lands and have added additional language to emphasize this point. However, it should be noted that patenting is not essential for minerals exploration and development because other provisions of the mining law give claim holders the right to use the land for mining-related activities. In addition, our 1989 report also identified (1) a number of laws enacted subsequent to FLPMA that accommodate mining while requiring that the federal government retain title to the land, subject to valid existing rights, and (2) other legislation that removed fuel and common variety minerals leaving hardrock minerals, such as gold, silver, lead, iron, and copper, and uncommon varieties of mineral materials, such as the sand in the Fox claims, as the only minerals still subject to the mining law's patent provision.

Time Line of Key Events in the Oregon Dunes Mining Claims and Patent Application Process

| Date | Action |
|--------------------|--|
| 1959 | |
| March | Senator Neuberger proposed a national seashore in the Oregon Dunes. |
| September-December | Maurice Duval located Dreamer claims 1-25 on 3,160 acres just north of Coos Bay within the proposed national seashore area. |
| December 30 | Maurice Duval located Fox claims 1-10 on 1,480 acres on the north spit of the mouth of the Umpqua River within the proposed national seashore area. |
| 1960 | |
| July 6 | The Forest Service notified the Duvals that it believed the sand in the area of the claims was a common variety and thus not subject to the Mining Law of 1872. |
| 1961 | |
| July 18 | BLM withdrew from mineral entry about 18,000 acres between the Siuslaw River and Coos Bay. |
| 1962 | |
| No specific date | Interior's Bureau of Mines issued Information Circular 8112, Industrial Silica Deposits of the Pacific Northwest. This report established that of 82 silica deposits evaluated in the Pacific Northwest, 37 were of high quality and 16 were large enough to be industrial silica resources. |
| 1963 | |
| September 30 | The Siuslaw National Forest requested a mineral examination and/or initiation of invalidation proceedings on the Dreamer claims. |
| 1964 | |
| No specific date | The Bureau of Mines issued Report of Investigation 6484, Beneficiation Studies of the Oregon Coastal Dune Sands for Use as Glass Sand. The information in this report was used extensively in the 1966 Forest Service Report of Mineral Examination on the Dreamer claims and was the basis of testimony given by both sides in the proceedings challenging the validity of the claims. |
| 1966 | |
| February 2 | The Forest Service's Report of Mineral Examination recommended that the Dreamer claims be challenged on the basis of (1) lack of discovery of a valuable mineral deposit due to failure to establish a market as of July 18, 1961, the date of withdrawal from mineral entry and (2) the widespread occurrence of similar silica sands along the Oregon Coast, which makes the sand on the claims a common variety and not under the Mining Law of 1872. This report also noted that Dreamer claim No 15 had been located on private land and was therefore invalid. |
| May 18 | BLM issued complaints OR 018149-018153 declaring the 24 remaining Dreamer claims null and void because a valuable mineral had not been discovered and the material on the claims was a common variety not subject to location. |
| 1967 | |
| October 9 | A hearing took place before BLM's Office of Hearing Examiners on the validity of the Dreamer claims (U.S. v. Maurice Duval et al). |
| 1968 | |
| March 15 | The Office of Hearing Examiners issued a decision against the claim holders. Because the Pacific Northwest, and the Coos Bay area in particular, contained a vast quantity of sand suitable for glass-making. |

(continued)

Appendix I
Time Line of Key Events in the Oregon Dunes
Mining Claims and Patent
Application Process

| Date | Action |
|--------------|--|
| | the deposits were held to be a common variety and not subject to location. In addition, because no market for the sand had been established, the claim holders had failed to meet the test of discovery. Dreamer claims Nos. 1-14 and 16-25 were declared null and void. The Duvals subsequently appealed this decision. |
| November 5 | BLM's Office of Appeals and Hearings affirmed the hearing examiner's March 15 decision. Decision stressed the widespread occurrence of the sand but did not specifically affirm that the sand was a common variety. The Duvals appealed this decision. |
| 1970 | |
| November 23 | The Interior Board of Land Appeals (IBLA) issued a decision (1 IBLA 103, 1970) that upheld the lower rulings that the Dreamer claims were null and void. IBLA decided the issue on the basis of the fact that a valuable mineral deposit had not been discovered and did not address the common variety question. |
| 1971 | |
| July 2 | The Duvals filed a petition for reconsideration of IBLA's decision stating that the record did not support the conclusions reached by IBLA. As an alternative to reversing IBLA's decision, the Duvals requested a further hearing to present additional evidence to establish proof that a valuable mineral deposit had been discovered prior to the date of withdrawal. |
| August 24 | Denying the petition for reconsideration, IBLA stated that the preponderance of the evidence, including new evidence in the petition, continued to support the conclusion that there was no valid discovery prior to July 18, 1961, the date of withdrawal. At this point the Duvals had exhausted the possible remedies within Interior's administrative law process. |
| September 29 | The Duvals filed a civil complaint in the U.S. District Court for Oregon against the Secretary of the Interior (Duval v. Morton, Civil No. 71-684) stating that IBLA had erred, was arbitrary and capricious, had not supported its decisions, and had abused its discretion when it denied the Duval's petition. |
| 1972 | |
| March 23 | Public Law 92-260 established the Oregon Dunes National Recreation Area. |
| August 23 | U.S. District Court issued a judgment in Duval v. Morton dismissing the civil complaint and finding that IBLA had considered all the evidence and correctly concluded that there had not been a valid discovery. The District Court's decision also stated that there had been no abuse by IBLA in denying the request for reconsideration of the further hearing. The Duvals appealed this decision to the U.S. Court of Appeals for the 9th Circuit. |
| 1973 | |
| August | The Duvals began mining sand near Coos Bay on private land and selling sand for use in glass manufacturing and in other industries. |
| December 19 | The U.S. Court of Appeals for the 9th Circuit affirmed the District Court decision. |
| 1974 | |
| | IBLA issued a decision in another case—McClarty v. Secretary of the Interior regarding whether a mineral deposit was common or uncommon. In reaching its decision, IBLA used the guidance that the U.S. Court of Appeals for the 9th Circuit established in 1969 when it remanded the case to IBLA for reconsideration of whether the mineral on which the |

(continued)

Appendix I
Time Line of Key Events in the Oregon Dunes
Mining Claims and Patent
Application Process

| Date | Action |
|--------------|--|
| | McClarty patent application was based was common or uncommon. The court's guidance remains germane today. |
| 1977 | |
| March 31 | The Forest Service Report of Mineral Examination concluded that the Fox claims were not valid because a valuable discovery had not been made prior to the date of withdrawal. This report, however, did not comment on whether the sand was a common variety. |
| April 18 | The Forest Service requested that BLM issue complaints challenging the validity of the 10 Fox claims because the claim holders had not demonstrated that a valuable mineral deposit had been located prior to July 18, 1961, the date of withdrawal of the lands from mineral location and entry. |
| November 4 | BLM issued complaints OR 17779-17886 challenging the validity of the 10 Fox claims on the basis of the lack of a discovery of a valuable mineral deposit. BLM did not contest whether the sands were a common variety. |
| 1978 | |
| May 17 | In a pre-hearing conference before an administrative law judge, attorneys for the claim holders and the government agreed that the sand in the claims was an uncommon variety and that this would not be an issue in the proceedings. |
| September 19 | A hearing took place before Interior's Office of Hearings and Appeals on the challenge to the validity of the Fox claims (U.S. v. Duval). |
| 1979 | |
| October 19 | The Office of Hearings and Appeals issued a decision upholding the validity of the Fox claims. The Duvals were required to prove that they had a valuable mineral deposit at the time of the withdrawal and at the time of the hearing. The decision was based on the fact that (1) sufficient evidence was introduced (much of it new) to rebut the government's testimony that discovery was not made prior to withdrawal and (2) no contradictory evidence was presented about discovery at the time of the hearing. By the time of the hearing, the Duvals were selling sand at a profit from their mining operation near Coos Bay. The Forest Service appealed this decision to IBLA. |
| 1981 | |
| March 26 | IBLA issued a decision (53 IBLA 341, 1981) that affirmed the decision of the administrative law judge upholding the validity of the Fox claims. The Forest Service said that at this point they had exhausted all possible remedies in the administrative law process. |
| 1982 | |
| January 27 | Duval filed an application for patent for Fox claims 1-10, comprising 1,480 acres. |
| May 27 | BLM issued a decision voiding 180 acres of the Fox claims that had been located on land acquired from individual citizens, businesses, and nonfederal governmental organizations and not covered by the mining law. This left 1,000 acres for consideration in the patent application. The Duvals appealed this decision. |
| October 12 | IBLA issued a decision (68 IBLA 111, 1982) that affirmed BLM's decision of May 27. |
| 1986 | |
| September 22 | BLM requested an opinion from Interior's Regional Solicitor to establish that title was vested with the claim holders. |

(continued)

Appendix I
Time Line of Key Events in the Oregon Dunes
Mining Claims and Patent
Application Process

| Date | Action |
|--------------|--|
| September 29 | Interior's Regional Solicitor issued a favorable opinion stating that the title evidence and accompanying data disclosed that the applicants had valid title to the claims. |
| 1987 | |
| February 17 | BLM requested additional information from the applicants to verify that at least \$500 of development work had been done for the benefit of each claim. The Duvals furnished the necessary documentation attesting to the development work performed. |
| June 22 | BLM issued the Mineral Entry Final Certificate certifying that the Duvals' patent application for the Fox claims (1,000 acres) met all requirements. After this document was issued, the claim holder no longer had to comply with the annual work requirement. |
| August 4 | A Forest Service consultant submitted his mineral examination, which recommended that 220 acres of the Fox claims should not be patented because they did not contain sufficient valuable minerals to be economically mined and that the remaining 780 acres should proceed to patent. The consultant also stated that on the basis of information supplied by the applicant, he believed that the \$500 expenditure requirement had been satisfied. |
| 1989 | |
| May 26 | The Forest Service notified BLM that it had no objection to patenting 780 acres of the Fox claims as recommended by the minerals examination report. |
| July 28 | The U.S. House of Representative's Committee on Interior and Insular Affairs, Subcommittee on Mining and Natural Resources, requested the Secretary of the Interior to delay patenting the Fox claims pending a thorough investigation by the Interior Department and the General Accounting Office. |
| July 28 | The Chairman, Subcommittee on Mining and Natural Resources, House Committee on Interior and Insular Affairs, requested the General Accounting Office to investigate the Fox mining claims. |
| July 28 | The State of Oregon's Department of Land Conservation and Development requested that BLM submit a consistency determination on the issuance of the mining patent under the provisions of the Coastal Zone Management Act. |
| September 26 | The Duvals, BLM, and the Forest Service signed a letter of intent for a land exchange and the Duvals agreed to take no action on the claims for 17 months while the parties attempted to complete the exchange. |
| October 7 | The Subcommittee on Mining and Natural Resources held a hearing in Eugene, Oregon, on the proposed patent of mining claims within the Oregon Dunes National Recreation Area. |
| October 10 | BLM issued Patent 36-90-0002 to 780 acres. |

Comments From the Department of the Interior

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240



Mr. James Duffus, III
Director, Natural Resources
Management Issues
General Accounting Office
Washington, D.C. 20548

OCT 12 1990

Dear Mr. Duffus:

Thank you for the opportunity to comment on the General Accounting Office's (GAO) report, FEDERAL LAND MANAGEMENT, Oregon Dunes National Recreation Area: Patenting of Mining Claims Complies with Law (GA)/RCED-90-216.

In general, we agree with the findings of the report. We are pleased to see that GAO concludes that the Bureau of Land Management (BLM) handled the Oregon Dunes case properly and consistently with all legal and administrative requirements. However, we disagree with the GAO implication that there are conflicts and inconsistencies between the 1872 Mining Law and the Federal Land Policy and Management Act of 1976 (FLPMA). The FLPMA does set a policy of Federal ownership of public lands and obtaining fair market value for its resources. However, FLPMA also specifically excludes the 1872 Mining Law, and specifically the patenting provisions, from this policy, thereby, showing the support of Congress for continuing this type of activity on public lands. The FLPMA further states that the public lands will be managed so as to meet the need for domestic sources of minerals, and to implement the Mining and Minerals Policy Act of 1970.

We recommend that the discussions in the GAO report regarding alleged inconsistencies be revised, to fully reflect that 1) the FLPMA excludes the Mining Law, and 2) the FLPMA does recognize the need for development of mineral resources on public lands. We further request that the portion of the appendix dealing with the Duval exchange be deleted as being beyond the scope of the report.

If there are any further questions regarding the enclosed comments, please call Reed Smith, Chief, Division of Mining Law and Salable Minerals, at 208-4147.

Sincerely,

David C. O'Neal
FOR Assistant Secretary, Land and
Minerals Management

Enclosure

See comment 1.

See comment 2.

See comment 3.

Appendix II
Comments From the Department of
the Interior

Response to
Draft Report by the General Accounting Office

FEDERAL LAND MANAGEMENT: "Oregon Dunes National Recreation Area:
Patenting of Mining Claims Complies with Law"
(GAO/RCED-90-216)

See comment 1.

GENERAL COMMENTS

The principal findings of the report are:

1. Sand on the Fox mining claims is subject to the Mining Law of 1872.
2. The legal and administrative requirements for determination of validity of an "uncommon variety" and application for mineral patent were met.
3. Patenting of mining claims is inconsistent with national natural resource policies.

Items one and two, above, vindicate BLM's handling of the Oregon Dunes case during the last 30 years.

The finding in item three is incorrect. The GAO report quotes the Federal Land Policy and Management Act of 1976 (FLPMA) as setting the policy of Federal ownership of public lands and obtaining fair market value for its resources. This is generally correct, however, FLPMA excludes the patenting provisions under the Mining Law of 1872 from this policy (43 U.S.C. 1701, Sec. 302(b)).

See comment 2

As expanded below, the GAO stresses the inconsistencies between FLPMA policy and the 1872 Mining Law. However, FLPMA states that:

"Except as provided in section 314, section 603, and subsection (f) of section 601 of this Act and in the last sentence of this paragraph [section 302(b)], no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872, or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress." 43 U.S.C. Sec. 1732(b).

The FLPMA also calls for "the public lands [to] be retained in Federal ownership, unless...it is determined that disposal of a particular parcel will serve the national interest." 43 U.S.C. Sec. 1701(a)(1). The FLPMA also provides that "the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute...." 43 U.S.C. Sec. 1701(a)(9). [Emphasis added.]

It would seem that Congress 1) did not want to repeal or amend the Mining Law when FLPMA was passed, 2) did want to retain lands, unless it was better for the national interest to dispose of the land, and 3) did want to receive fair market value for lands and their resources, unless otherwise provided for by statute.

The GAO quotes FLPMA for support that the Mining Law and the management of other national resources are incongruent, and yet in that same Act, FLPMA is trying to provide guidance so as not to preclude mining and other valid uses of the land, i.e., guidance for the multiple-use of the public lands, including mining. The GAO is not showing the whole picture.

OTHER COMMENTS

See comment 4.

1. Page 2, paragraph 1: "diligence" or "annual work" requirement should be "diligence" or "annual labor" requirement.

See comment 5.

2. Page 5, paragraph 1: "...GAO concluded in a March 1989 report1..." --footnote numbering not clear; number should be raised or typed as follows: 1/.

See comment 5.

3. Page 12, paragraph 1: "Oregon Dunes National Recreation Area Act of March 23, 1972," also 86 Stat. 99, Public Law 92-260.

SPECIFIC COMMENTS

See comment 2.

1. On pages 5, 10, and 26-27, the GAO emphasizes that the mineral patent process as authorized by the 1872 Mining Law runs counter to other national natural resource policies as provided for in the Federal Land Policy and Management Act (FLPMA) of 1976.

However, nowhere does the GAO report point out that FLPMA in Sec. 102(12) states that:

"the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals...from the public lands including [the] implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to public lands..."
43 U.S.C. Sec. 1701(a)(12).

The Mining and Mineral Policy Act of 1970 states that it is:

"...the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal, and

minerals reclamation industries, [and] (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security, and environmental needs...." 30 U.S.C. Sec.21a. And further in the Act, "It shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising his authority under such programs as may be authorized by law other than this section." 30 U.S.C. Sec.21a.

Mining, claim-staking, and patenting are legitimate uses of the public lands, and as such, are the means by which private enterprise is encouraged to develop an economically sound and stable domestic mining industry, as mandated by the Mining and Mineral Policy Act of 1970. The BLM has managed mining uses, along with range, recreation, wildlife, lands, and other uses through its planning and environmental processes to try to meet the needs of the public in an equitable and environmentally sound manner.

Again on page 26, GAO fails to mention that the same act (FLPMA) calling for "maintain[ing] ownership of public lands and ... obtain[ing] fair market value," also calls for "the public lands [to] be managed in a manner which recognizes the Nation's need for domestic sources of minerals...." 43 U.S.C. Sec. 1701(a)(12).

See comment 6.

2. On page 9, paragraph 1 under "Background", states "First, neither prior notification to the government nor a permit is required when prospecting for minerals covered by the act."

This statement is misleading. The Mining Law of 1872 requires \$100 of annual labor, and 43 CFR 3833.2-4 requires that a mining claimant file annually an affidavit of assessment work, or a notice of intent to hold the claim—43 CFR 3822.2-5. Assuming that a mining claimant is being diligent, and complying with the intent of the mining laws and regulations, the mining claimant is giving "notification" to the Federal Government, as well as the State and counties, by filing this affidavit that he is actively prospecting his mining claim. In addition, under 43 CFR 3809.1-3, a notice must be filed by the mining claimant with the authorized officer for operations, including prospecting, that will disturb 5 acres or less of surface. Approval for notice-level activity is not required, but reclamation of the site, is required. For surface disturbances over 5 acres, an approved plan of operations and an environmental review, including reclamation plans, are required prior to commencement of mining activities. The standard for all activities by mining claimants/mine operators, regardless of acreage disturbed, is that they not create undue or unnecessary degradation of the land as per FLPMA at Sec. 302(b).

On page 22, it is pointed out under "Maintaining" that an annual filing is required by BLM and the counties.

See comment 7.

3. On page 10, regarding the reference to "the COMMON VARIETIES ACT OF 1955." This is NOT the title this Act is known by, and only a portion of this Act deals with common varieties.

This 1955 Act has always been referred to in case law, and other references as the following:

- a) An Act to Amend the Act of July 31, 1947
- b) Public Law 167
- c) the Act of July 23, 1955
- d) the Multiple Use Mining Act of 1955
- e) the Surface Resources Act of 1955--a misnomer

As far as the citation goes, the proper citation is 69 Stat. 367, 30 U.S.C. Sec. 601. Sec. 611 is only the part of the Act of 1955 that refers to common varieties.

See comment 5.

4. Referring to comments on page 12, it should be noted that Sec. 10 of the Oregon Dunes National Recreation Area Act withdraws the affected lands from location, entry, and patent under the US mining laws subject to valid existing rights (emphasis added). 16 U.S.C. Sec. 460z-8. Congress recognized that there may be valid activities taking place that were to be protected from a takings.

See comment 5.

5. In reference to footnote 6, page 16, mining claims located prior to October 21, 1976, had to be recorded with the BLM on or before October 22, 1979, or else they would be considered abandoned and void (see 43 CFR 3833.1-1). Therefore, the last sentence of the footnote is true that before 1976 BLM had no filing requirement on most public lands (PL 359 lands and O&C lands were some exceptions), but pursuant to FLPMA, after October 22, 1979, they had to file annually with BLM to maintain their mining claims.

However, this point is made on page 22 under "Recording."

6. On page 18, paragraph 1, GAO states that the presence of a patented mining claim in a national recreation area "illustrates the inconsistencies between the patenting provision of the mining law and federal stewardship requirements in other national resource legislation."

See comment 8.

The GAO points out on page 1, that these claims were properly located in 1959. This is before any of the legislation introducing the alleged inconsistencies between these two valid (multiple) uses of this land. The claims were located prior to the Oregon Dunes Act of 1972, prior to the Wilderness Act of 1964, FLPMA of 1976, etc.

The claims were in existence in the Oregon Dunes prior to the Act of 1972. Congress did recognize that there were valid existing rights in the area--see no. 4 above. Congress could have adjusted the boundaries to exclude the mining activity from the recreation area, and thereby avoiding conflict. However, by withdrawing the land, Congress restricted the uses of this area.

See comment 8.

7. On page 18, again, the GAO stresses the problems with the incongruity between mining and recreation. However, once again, the mining activity in this area pre-dated the establishment of the recreation area. The recreation area was created to prohibit any further mining of the area. On page 24, the GAO states that the Forest Service wants to prevent mining in the recreation area by acquiring the patented land through an exchange.

See comment 7.

8. Page 20, paragraph 1, again refers to "the Common Varieties Act."

RECOMMENDATIONS

We feel that the discussions involving alleged inconsistencies and conflicts between the 1872 Mining Law and FLPMA are incorrect and should be revised.

See comment 2.

If these discussions are retained, we feel that our comments regarding these inconsistencies be included in the report.

The following are GAO's comments on the Department of the Interior's letter dated October 12, 1990.

GAO's Comments

1. The identification number for this report has been changed to (GAO/RCED-91-8) to reflect the fiscal year in which it was issued.

2. Interior commented that GAO implied that there are conflicts and inconsistencies between the Mining Law of 1872 and the Federal Land Policy and Management Act of 1976 (FLPMA). Interior pointed out that FLPMA sets a policy of federal ownership of public lands and obtaining fair market value for its resources, but in doing so excludes the Mining Law of 1872 and specifically the patent provision. Interior also commented that GAO had not recognized other national policies that call for managing public lands to meet the demands for domestic sources of minerals and fostering and encouraging private enterprise to develop these resources.

We are sensitive to the need to manage public lands to meet demand for domestic sources of minerals and to foster and encourage private enterprise to develop these sources and recognize that FLPMA exempts the Mining Law of 1872 and its patent provision from current national natural resource policies relating to federal stewardship of public lands. To clarify this, we have made changes to the report text. However, patenting is not essential for mineral exploration and development because other provisions of the mining law give claim holders the right to use the land for mining-related activities. In addition, our 1989 report also identified (1) a number of laws enacted subsequent to FLPMA that accommodate mining while requiring that the federal government retain title to the land, subject to valid existing rights and (2) other legislation that has left hardrock minerals, such as gold, silver, lead, iron, and copper, and uncommon varieties of mineral materials, such as the sand in the Fox claims, as the only minerals still subject to the mining law's patent provision.

3. Interior requested that the portion of the appendix dealing with the Duval exchange be deleted because it is beyond the scope of the report. We continue to make reference to the Duval exchange because we believe the potential land exchange is an integral part of the report in that the factors prompting the Forest Service to pursue an exchange and its potential cost to the government illustrate why we believe the patent provision of the mining law should be eliminated.

4. Interior commented that the diligence requirement should be referred to as the "annual labor" requirement rather than the "annual work" requirement. The Mining Law of 1872 provides that the annual amount of work necessary to hold a mining claim would be "not less than one hundred dollars' worth of labor." However, the range of activities that currently satisfy the annual diligence requirement, such as geological, geochemical, and geophysical surveys, go far beyond a miner's labor. Accordingly, we believe that the phrase "annual work requirement," which appears to be virtually interchangeable with "annual labor requirement," is more descriptive, and thus we use it consistently throughout our reports.

5. Clarifications have been made to the text of this report.

6. The text has been clarified to better describe the mining law's right of self-initiation that allows citizens, either corporate or individual, with no governmental permission, to locate mining claims or to conduct necessary activities that do not disturb the surface on lands open to mining.

7. We have replaced the "Common Varieties Act of 1955" with the "Multiple Use Mining Act of 1955."

8. Interior commented that the Fox claims in the Oregon Dunes do not illustrate an inconsistency between mining and recreation because the mining activity (staking the claims) occurred before the recreation area was established. Our report clearly acknowledges the existing rights of the claim holders, including the right to patent the lands. However, we believe that the patenting of mining claims within a national recreation area for a fraction of the land's estimated value, coupled with the accompanying management problems that it creates, is another example of the mining law's inconsistency with more recent national natural resource policies.

Comments From the Forest Service

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



United States
Department of
Agriculture

Forest
Service

Washington
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14th & Independence SW
P.O. Box 96090
Washington, DC 20090-6090

Reply To: 1420

Date: SEP 13 1990

Mr. John W. Harman, Director
Land and Agriculture Issues
Resources, Community, and Economic
Development Division
General Accounting Office
Washington, D.C. 20548

Dear Mr. Harman:

We have reviewed the draft report entitled Federal Land Management: Oregon Dunes National Recreation Area Patenting of Mining Claims Complies With Law, GAO/RCED-90-216. We believe the report accurately describes the events that took place, the actions by the Government, and addresses the issues and specific questions (pages 15 and 16) by Chairman Nick Rahall of the House Subcommittee on Mining and Natural Resources.

The following technical aspects need to be addressed:

(1) The statement on page 2, paragraph 3, implies the Forest Service is required to sell mineral materials. The disposal of mineral materials is a discretionary action, and frequently done without user fees.

(2) The references that the Forest Service withdrew lands from mineral entry are not correct. The Government does this through the Bureau of Land Management.

(3) Most of the first line on page 2 is not germane to the scope of the report. We recommend it read "for mining activities and extract the minerals."

(4) The second sentence of paragraph 2, page 2, is not technically correct. The test for discovery only requires a reasonable prospect of success.

(5) There is not a specific name for the Act of July 23, 1955, but the popular name most frequently used is the Multiple Use Mining Act of 1955.

(6) Paragraph 2, on page 9 is misleading in implying that a mining claim holder can prospect on National Forest System land without notifying the Forest Service. The text should reflect the language of the Federal regulations for locatable minerals (36 CFR 228.4) which requires the filing of a Notice of Intent with the Forest Service, and a Plan of Operations when surface disturbance will be significant.



Caring for the Land and Serving People

FS-6200-220/4/80

See comment 1.

See comment 2.

See comment 2.

See comment 3.

See comment 2.

See comment 2.

See comment 2.

Appendix III
Comments From the Forest Service

See comment 2.

See comment 2.



Mr. John W. Harman

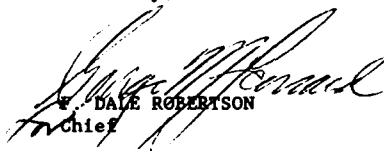
2

(7) The correct spelling is McClarty, not McClarity (page 20).

(8) On page 23, the first paragraph indicates that the validity of the claims was challenged by the Forest Service. In the context used, this general statement needs clarification. The Forest Service challenged the validity of the claims in an administrative hearing (contest) and also challenged the information submitted by the claim holders indicating \$500 of expenditures per claim. The paragraph is referring to the latter challenge.

These are our points of concern. Thank you for the opportunity to comment on the draft report. If you have any questions on our comments, please contact Sam Hotchkiss at 453-8235.

Sincerely,


DALE ROBERTSON
Chief

cc:
OIG (J. Hill)
M&GM
Lands
F&PS



Caring for the Land and Serving People

FS-6200-220(4/88)

The following are GAO's comments on the Forest Service's letter dated September 13, 1990.

GAO's Comments

1. The identification number for this report has been changed to (GAO/RCED-91-8) to reflect the fiscal year in which it was issued.
2. Clarifications have been made to the text of this report.
3. The Forest Service commented that the report's statement concerning claim holders' rights to sell extracted materials without monetary compensation to the government is not germane to the scope of the report. The report describes the mining law's provisions governing the sale of minerals because it is an integral part of the mining law and because it makes clear one of the important benefits derived from having the sand in the Oregon Dunes claims determined to be uncommon rather than common and therefore subject to the Multiple Use Mining Act of 1955.

Major Contributors to This Report

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